

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C.

DIRECTOR, OFFICE OF
PROFESSIONAL RESPONSIBILITY

Complainant,

v.

Complaint No. 2008-19

Philip E. Koenig,

Respondent.

DECISION ON MOTION FOR DEFAULT JUDGMENT

On February 5, 2009, a Complaint was issued on behalf of the Acting Director, Office of Professional Responsibility (OPR), Internal Revenue Service, pursuant to 31 C.F.R. §§10.50, 10.51, 10.52, 10.60 and 10.62¹, issued under the authority of 31 U.S.C. §330, alleging that Respondent Philip E. Koenig, an attorney engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. §10.2(d), engaged in disreputable conduct within the meaning of 31 C.F.R. §10.51 and is subject to suspension or disbarment from such practice. Specifically, it is alleged that the Respondent failed to file and/or timely file Federal individual income tax returns (IRS Form 1040) and failed to pay and/or timely pay Federal individual income taxes due and owing for tax years 2001, 2002, 2003, 2004 and 2005.

¹ The regulations governing the practice before the IRS, found at 31 C.F.R. Part 10, were most recently revised on September 26, 2007. The savings clause contained at 31 C.F.R. §10.91 of the revised regulations provides that any proceeding under the part based on conduct engaged in prior to September 26, 2007, which is instituted after that date, shall apply the procedural rules of the revised regulations contained in Subpart D (Rules Applicable to Disciplinary Proceedings) and E (General Provisions). However, "...conduct engaged in prior to September 26, 2007, shall be judged by the regulations in effect at the time the conduct occurred." 31 C.F.R. §10.91 (2007)

Pursuant to 31 C.F.R. §10.62, Respondent's Answer to the complaint was due within thirty (30) calendar days from the date of the service of the complaint. The Respondent did not file an answer to the complaint on or before that date.

On March 23, 2009, the Acting Director of OPR filed its Complainant's Motion for a Decision by Default Judgment, moving that the Administrative Law Judge grant the relief requested in the complaint and specifically order that the Respondent be disbarred for a period of at least four (4) years from further practice before the Internal Revenue Service (IRS) pursuant to the provisions of 31 C.F.R. §§10.50, 10.52, 10.76 and 10.79, issued under the authority of 31 U.S.C. §330, reinstatement thereafter being at the sole discretion of the OPR. The motion is based on the Respondent's failure to file an Answer to the complaint. The regulations provide authority for a decision by default where the practitioner does not timely file an answer, despite his receipt of the complaint, notice of the requirement to answer, and the potential consequence of a default decision. 31 C.F.R. §10.64(d). Where the practitioner fails to file an answer to the complaint within the time prescribed, said failure constitutes a waiver of the right to a hearing and the allegations set forth in the complaint are deemed admitted. 31 C.F.R. §10.64(d).

On March 28, 2009, the Respondent filed an answer to the complaint, in which he admitted and denied various allegations of the complaint. The Respondent did not include any explanation for why his answer was filed after the due date set forth in the complaint.

On April 8, 2009, I issued an Order to Show Cause, requesting the parties to show why the Respondent's answer to the complaint should not be struck as untimely and the Complainant's Motion for Default Judgment should not be granted.

The Respondent filed his Declaration in Response to Order to Show Cause on April 21, 2009, in which he noted that he had been actively engaged in the practice of law since 1975 and had never been disciplined as a lawyer. He stated that he did not receive any type of communication from the Complainant prior to the receipt of the Motion for Default Judgment. The Respondent further stated that this matter had been pending since December 2006 and that he had never taken any action to merely stall or delay the proceedings. He hired an attorney in December 2007 to attempt to resolve the matter. The Respondent states that his failure to respond by the date set forth in the Complaint was a result of his attending to time sensitive matters on behalf of clients. He then set

forth an explanation of the work he had done for his clients during the time the complaint had been filed and the answer was due. The Respondent asserts that his failure to timely file an answer was not due to a lack of respect for the tribunal, rather it was “the product of the customs and protocol under which I have practiced law for over thirty years and the burden of attending to deadlines on behalf of clients”.

On April 27, 2009, the Complainant filed a Reply to Respondent’s Response to the Show Cause Order. The Complainant asserts that on February 2, 2009, he served a Complaint and Notice of Institution of Proceedings upon the Respondent. The Notice of Institution of Proceedings advised the Respondent of his rights and obligations, including his obligation to respond to the Complaint. The Complainant asserts, in opposition to the Respondent’s allegations, that the service of those documents dated February 5, 2009 shows that the counsel for the Complainant had contacted the Respondent prior to filing the Motion for Default Judgment. The Complainant also points out that the Respondent never contacted counsel for the Complainant or the Administrative Law Judge to request an extension of time to submit an answer. The Complainant also asserts that the Respondent’s delay in answering the complaint lends credence to the charges against him. In conclusion, the Complainant asserted that the Respondent has failed to show sufficient good cause as to why the Administrative Law Judge should accept the Respondent’s untimely answer and that the Complainant is entitled to entry of default judgment against the Respondent.

Having carefully reviewed the pleadings before me, I find that the Respondent has failed to adequately explain why his untimely answer should be accepted. As an attorney, he was aware of the proceedings in this matter and the seriousness of this situation. He had an obligation to understand and follow the regulations under which these proceedings are held. The fact that he was not personally contacted prior to the Motion for Default Judgment being filed is not related to whether he should be excused for filing his answer in an untimely manner. Further, I find his explanation that he was involved in other work representing his clients, while understandable, is not sufficient and therefore, I find his answer to be untimely filed and will not consider it in this matter. The Respondent is therefore deemed to have admitted all of the allegations of the Complaint. Therefore, I find that there are no material issues of fact to be resolved and that a decision on the motion for default judgment is the appropriate way to dispense of this matter. The uncontested facts establish the following:

FINDINGS OF FACT

1. The Respondent has engaged in practice before the Internal Revenue Service, as defined in 31 C.F.R. §10.2(a), as an attorney.
2. The Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility in accordance with 31 C.F.R. §§10.3 and 10.50.
3. The Respondent's last known address of record with the Internal Revenue Service is Address 1.
4. At all times relevant to this complaint, the Respondent was involved in the presentation of matters to the Internal Revenue Service concerning matters relating to taxpayers, as defined by 31 C.F.R. §10.2(a)(4).
5. At all time relevant to this complaint, the Respondent received gross income exceeding the minimum amount that would require him to timely file an individual Federal income tax return (IRS Form 1040) on or before the date due for such return.
6. Pursuant to 31 C.F.R. §§10.50 and 10.60, the Secretary of the Treasury, by her delegate, here the Office of Professional Responsibility of the IRS, may take a disciplinary action against any practitioner who is shown, *inter alia*, to be disreputable, or who fails to comply with any regulation in these parts.
7. The Respondent is subject to the regulations governing practice before the IRS by virtue of 31 C.F.R. §10.0 *et seq.*, particularly §§10.50, 10.52 and 10.60, and by virtue of those provisions, is subject to disbarment or suspension from practice before the Internal Revenue Service due to disreputable conduct.
8. The Respondent is subject to disbarment or suspension from practice before the IRS under 31 C.F.R. §§10.50 and 10.52, by reason of the fact that the Respondent has engaged in disreputable conduct, as set forth under 31 C.F.R. §10.51, the circumstances of such conduct are more particularly set forth hereinafter.
9. In compliance with 31 C.F.R. §10.60(c), the Respondent previously has been advised in writing of the law, facts and conduct warranting the issuance of the complaint, and has been accorded an opportunity to dispute facts, assert additional facts and make arguments.

10. The Respondent was required by 26 U.S.C. §§6011, 6012 and 6072 to timely file his individual Federal income tax returns (IRS Form 1040) for:

- a. tax year 2001
- b. tax year 2002
- c. tax year 2003
- d. tax year 2004
- e. tax year 2005

11. The Respondent failed to timely file his individual Federal income tax return (IRS Form 1040) for:

- a. tax year 2001
- b. tax year 2002
- c. tax year 2003
- d. tax year 2004
- e. tax year 2005

12. The Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to pay/timely pay his individual Federal income taxes due and owing for:

- a. tax year 2001
- b. tax year 2002
- c. tax year 2003
- d. tax year 2004
- e. tax year 2005

13. The Respondent failed to pay/timely pay his individual Federal income taxes due and owing for:

- a. tax year 2001
- b. tax year 2002
- c. tax year 2003
- d. tax year 2004
- e. tax year 2005

14. The Respondent's failure to timely file said tax returns for tax years 2001, 2002, 2003, 2004 and 2005 was willful.

15. Such willful failure to timely file said tax returns constitutes disreputable conduct pursuant to 31 C.F.R. §10.51 generally and a willful violation of §10.51(d)(rev. 1994) more particularly, for which the Respondent may be censured, suspended or disbarred from practice before the Internal Revenue Service.
16. The Respondent's failure to timely pay said taxes for the tax years 2001, 2002, 2003, 2004 and 2005 was willful.
17. Such willful failure to timely pay said taxes constitutes disreputable conduct pursuant to 31 C.F.R. §10.51 generally and, more particularly, a willful violation of §§10.51 and 10.51(f)(rev. 2002), for which the Respondent may be censured, suspended or disbarred from practice before the internal Revenue Service.

The Respondent is an attorney who has engaged in practice before the Internal Revenue Service. As such, he is subject to the disciplinary authority of the Secretary of the Treasury and the Director or Acting Director of OPR. 31 U.S.C. §330(a)(1). The Respondent was required to file a Federal income tax return for tax years 2001 through 2005. Those returns were due on or before April 15 of the following calendar year. The Complainant asserts that the tax returns were not timely filed for tax years 2001 through 2005. Further, the Respondent was required to timely pay his individual Federal income taxes due and owing for tax years 2001 through 2005. The Complainant asserts that the Federal income taxes due and owing for years 2001 through 2005 were not paid.

Since the Respondent's answer to the complaint was untimely, according to the regulations, it has not been considered in this matter. Therefore, the Respondent is found to have admitted each allegation, pursuant to §10.62 of the IRS regulations. In conclusion, the Respondent has admitted that he has failed to timely file tax returns and has failed to timely pay taxes due and owing.

Pursuant to 31 C.F.R. §10.50, the Respondent's eligibility to practice before the Internal Revenue Service is subject to suspension or disbarment by reason of engaging in disreputable conduct. Willfully failing to timely file a Federal income tax return in violation of the revenue laws of the United States constitutes disreputable conduct within the meaning of 31 C.F.R. §10.51(d). Further, willfully failing to timely pay individual Federal income taxes due and owing in violation of the revenue laws of the United States constitute disreputable conduct within the meaning of 31 C.F.R. §10.51(f). As an attorney representing taxpayers before the Internal Revenue Service, the Respondent was aware of his responsibility to timely file individual Federal income tax returns (IRS Form 1040) and to timely pay income taxes due and owing. I find that the Respondent's repeated willful failure to do so for five years constitutes disreputable conduct within the meaning of the regulations.

With regard to the remedy in this matter, the Complainant seeks to have the Respondent disbarred for at least four (4) years from further practice before the Internal Revenue Service because of his failure to comply with his Federal income tax obligations from Years 2001 through 2005. I find the recommendation of OPR concerning the appropriate penalty is entitled to substantial deference. The Respondent, an attorney, was aware of his obligations to timely file his tax returns and to timely pay taxes due and owing, but chose not to fulfill his obligations. The allegations against the Respondent are serious in nature and it is important to deter similar conduct by other certified agents. Accordingly, I find that, under all the circumstances, disbarment from practicing before the IRS is appropriate.

ORDER

The Respondent, Philip E. Koenig, is hereby disbarred from practice before the Internal Revenue Service.²

Dated at Washington, D.C., July 2, 2009.

Susan E. Jelen
Administrative Law Judge

² Pursuant to 31 C.F.R. §10.77, either party may appeal the Decision to the Secretary of the Treasury within thirty (30) days from the date of issuance.